Sri Sutera Sdn Bhd v Mohamed bin Abid and another appeal

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEALS NO W–02–870 OF 2001 AND W–02–872 OF 2001

MOHD NOOR AHMAD, RICHARD MALANJUM AND MOHD GHAZALI JJCA

7 NOVEMBER 2003

Agency — Liability of agent — Whether personally liable — Absence of contract to the contrary — Contracts Act 1950 s 183

Civil Procedure — Appeal — Interference by appellate court — Conclusions of trial judge based on findings of fact and on credibility — Whether appellate court to interfere with findings

The second defendant ('D2') represented to the plaintiff that he was a director of the first defendant ('D1') and that he was able to purchase used cars from the United Kingdom by using D1's approval permits to import and resell the cars locally for a profit. It was agreed that D2 would source for the cars and after notifying the plaintiff, the plaintiff would instruct D2 to purchase them with the money to be advanced by the plaintiff. On arrival in Malaysia, D2 would cause the cars to be sold for a profit, to be shared between them after deducting the plaintiff's advance. Between August and October 1992, the plaintiff paid a sum of £87,100 to D2 to purchase five cars. The cars were subsequently shipped to Port Klang with both the defendants named as consignees in the bill of lading. D1 took possession of the cars and subsequently paid the plaintiff a sum of £31,500 to account for the price of the cars advanced by the plaintiff but failed to pay the plaintiff half of the profit made from the sale. Thereafter, D1 took possession of the remaining three cars. It was agreed that the three cars would be delivered to the plaintiff. However, the defendants failed to do so. The plaintiff claimed against the defendants, inter alia, for a specified sum, being half of the profit made from the sale of the two cars and for a quantified sum, being the value of the three cars or alternatively, in respect of the three cars, for their possession. D1 denied that D2 was its director or agent. The defendants claimed that D1 had given to D2 a deposit of RM250,000 for the purchase of six to eight cars and that D2 had sold six of such cars to the plaintiff. The defendants further contended that the five cars claimed by the plaintiff were in fact amongst the six cars sold to the plaintiff. The learned judge accepted the existence of a separate agreement between D1 and D2 whereby the former, as an importer of cars from London, would buy the cars from the latter but rejected all the evidence relating to the purported payment of RM250,000 deposit by D1 to D2 because it was not pleaded. On the issue of agency, the learned judge he found as a fact that D2 was an agent of D1 with authority to bind D1 as shown by the fact that he could sign for and on behalf of D1 in respect of a car sale agreement. The judge held that the plaintiff had proven his case against the defendants and ordered damages and quantum to be dealt with by the deputy registrar. This was the defendants' appeal.

Held, dismissing D1's appeal but allowing D2's appeal:

(1) The learned judge was right in law and in fact in making the selective approach by accepting the existence of a separate agreement between D1 and D2 but rejecting the evidence relating to the purported payment of RM250,000 deposit by D1 to D2. The payment of deposit was concerned with pleadings and because the material matter was not pleaded, trite law demanded that it be rejected. Although the judge did not reject the existence of a separate agreement, he considered it and used it as one of the basis for holding that D2 was an agent of D1 with authority to bind D1. On the issue of agency, the learned judge had arrived at his findings and conclusions based on the totality of the evidence adduced. Hence, the Court of Appeal declined to interfere with the conclusions of the learned judge based on the findings of fact and on credibility (see paras 8, 11).

(2) In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal nor would he be personally bound by them. As such, D2 being the agent of D1, could not be personally liable on contract entered into by him on behalf of D1 (see para 13).

[**Bahasa Malaysia summary**

Defendan kedua ('D2') telah memperkenalkan diri kepada plaintif bahawa beliau adalah pengarah defendan pertama ('D1') dan bahawa beliau mampu untuk membeli kereta-kereta terpakai dari United Kingdom dengan menggunakan permit-permit kelulusan D1 untuk mengimport dan menjual semula kereta-kereta tersebut dalam negeri untuk mendapat keuntungan. Ia telah dipersetujui bahawa D2 akan mencari kereta-kereta sedemikian dan setelah memaklumkan kepada plaintif, plaintif akan mengarahkan D2 untuk membeli kereta-kereta tersebut dengan wang yang didahulukan kepada plaintif. Setibanya di Malaysia, D2 akan menyebabkan kereta-kereta tersebut dijual untuk mendapat keuntungan, yang akan dibahagikan antara mereka selepas menolak wang pendahuluan plaintif. Antara Ogos dan Oktober 1992, plaintif telah membayar sejumlah £87,100 kepada D2 untuk membeli lima buah kereta. Kereta-kereta tersebut kemudiannya diangkut ke Port Klang dengan kedua-dua defendan sebagai penerima-penerima konsain dalam bil pengangkutan. D1 telah mengambil milikan kereta-kereta tersebut dan kemudiannya telah membayar plaintif sejumlah £31,500 sebagai jumlah wang yang didahulukan untuk kereta-kereta tersebut oleh plaintif tetapi telah gagal membayar kepada plaintif separuh daripada keuntungan yang diperoleh daripada jualan tersebut. Berikutan itu, D1 telah mengambil milikan ke atas tiga buah lagi kereta tersebut. Ia telah dipersetujui bahawa ketiga-tiga kereta tersebut akan diserahkan kepada plaintif. Namun begitu, defendan-defendan telah gagal berbuat demikian. Plaintif telah menuntut terhadap defendan-defendan, antara lain, untuk jumlah spesifik, yang merupakan separuh daripada keuntungan yang dibuat daripada jualan kedua-dua kereta tersebut dan untuk jumlah terhitung, iaitu nilai ketiga-tiga kereta tersebut atau secara alternatifnya, berkaitan ketiga-tiga kereta tersebut, untuk milikan mereka.

D1 menafikan bahawa D2 adalah pengarah atau ejennya. Defendan-defendan mendakwa bahawa D1 telah memberikan D2 satu deposit berjumlah RM250,000 untuk pembelian enam hingga lapan buah kereta dan bahawa D2 telah menjual enam buah kereta sedemikian. Defendan-defendan seterusnya menegaskan bahawa lima buah kereta yang dituntut oleh plaintif pada hakikatnya adalah antara enam buah kereta yang dijual kepada plaintif. Hakim yang bijaksana telah menerima kewujudan satu perjanjian berasingan antara D1 dan D2 di mana D1, sebagai pengimport kereta-kereta dari London, akan membeli kereta-kereta tersebut daripada D2 tetapi telah menolak kesemua keterangan berkaitan bayaran RM250,000 yang dikatakan telah didahulukan oleh D1 kepada D2 kerana ia tidak diplidkan. Berhubung persoalan ejensi, hakim yang bijaksana mendapati pada hakikatnya bahawa D2 adalah seorang ejen D1 yang diberi kuasa untuk mengikat D1 sebagaimana ditunjuk melalui fakta bahawa beliau boleh menandatangani untuk dan bagi pihak D1 berkaitan perjanjian jualan kereta. Hakim telah memutuskan bahawa plaintif telah membuktikan kes beliau terhadap defendan dan memerintahkan timbalan pendaftar menetapkan ganti rugi dan kuantum. Ini adalah rayuan defendan-defendan.

Diputuskan, menolak rayuan D1 dan membenarkan rayuan D2:

(1) Hakim yang bijaksana adalah betul dari segi undang-undang dan fakta dalam membuat pendekatan selektif dengan menerima kewujudan satu perjanjian berasingan antara D1 dan D2 tetapi menolak keterangan berkaitan bayaran RM250,000 yang dikatakan telah didahulukan oleh D1 kepada D2. Bayaran deposit tersebut adalah berkaitan pliding-pliding dan oleh kerana perkara yang material tidak diplidkan, undang-undang tetap menuntut agar ia ditolak. Walaupun hakim tidak menolak kewujudan satu perjanjian berasingan, beliau telah menimbangnya dan menggunakannya sebagai salah satu asas untuik memutuskan bahawa D2 adalah ejen D1 yang diberi kuasa untuk mengikat D1. Berhubung persoalan ajensi, hakim yang bijaksana telah tiba kepada satu penemuan dan kesimpulan beliau berdasarkan keseluruhan keterangan yang dikemukakan. Justeru itu, Mahkamah Rayuan enggan campur tangan dengan keputusan-keputusan hakim yang bijaksana berdasarkan penemuan-penemuan fakta dan kebolehpercayaan (lihat perenggan-perenggan 8, 11).

(2) Dengan ketiadaan apa-apa kontrak yang berkuatkuasa, seorang ejen tidak boleh dengan sendirinya menguatkuasakan kontrak-kontrak yang dimasuki olehnya bagi pihak prinsipalnya mahupun akan beliau terikat dengannya. Oleh itu, D2 sebagai ejen D1, tidak boleh dengan sendirinya bertanggungjawab atas kontrak yang dimasuki oleh beliau bagi pihak D1 (lihat perenggan 13).]

Notes

For cases on interference by the appellate court, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) para 853.

Cases referred to

Attorney-General For Ceylon v AD Silva [1953] AC 461 (refd)
KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 MLJ 233 (refd)
Medicon Plastic Industries Sdn Bhd v Syarikat Cosa Sdn Bhd [1993] 2 MLJ 416 (refd)
Plantation Agencies Sdn Bhd v Haji Ariffin bin Haji Ismail [1978] 1 MLJ 219 (refd)

Legislation referred to

Contracts Act 1950 s 183
Evidence Act 1950 s 103

Appeal from: Civil Suit No S2-22-170 of 1993 (High Court, Kuala Lumpur)

S Murthi (S Murthi & Assoc) for the first defendant/appellant.
N Ramash (Ramash & Co) for the second defendant/appellant.
Dato' Ghazi Ishak (Nordin Sulaiman with him) (Ghazi & Lim) for the plaintiff/respondent.

Mohd Noor Ahmad JCA (delivering judgment of the court):

[1] The defendant appealed against part of the decision of the learned judge who held that the plaintiff had proved his case against them and ordered that damages and quantum to be dealt with by the deputy registrar, costs to be paid by the defendants and the defendants' counterclaim be dismissed with costs.

[2] We dismissed the first defendant's appeal with costs and ordered the deposit to be paid towards taxed costs. However, we allowed the second defendant's appeal with costs and ordered the deposit to be refunded to him.

[3] Here are our reasons:

(1) Briefly, sometime in the middle of 1992, the plaintiff met the second defendant whom he had known for 20 years. The second defendant represented to him that he was a director of the first defendant and that he was able to purchase used Mercedes Benz cars from the United Kingdom by using the first defendant's approval permits ('the APs') to import and resell the cars locally for a profit. It was agreed that the second defendant would source for the cars and after notifying the plaintiff, the plaintiff would instruct the second defendant to purchase them with the money to be advanced to the second defendant through the plaintiff's son ('PW2') in London. Before the shipment to Malaysia, PW2 would inspect the cars. On arrival, the second defendant would cause the cars to be sold. The profit would be shared between the plaintiff and the second defendant after deducting the plaintiffs advance. Between August and October 1992, the plaintiff had paid a total sum of £87,100 to the second defendant to purchase five cars. All the cars were subsequently shipped to Port Klang with both the defendants named as consignees in the bill of lading. In October 1992, the first

defendant took possession two of the cars and subsequently paid the plaintiff a sum of £31,500 to account for the price of the cars advanced by the plaintiff but failed to pay the plaintiff half of the profit made from the sale. In January 1993, the first defendant took possession of the remaining three cars. It was agreed that the three cars would be delivered to the plaintiff. However, the defendants failed to do so.

(2) In the action, the plaintiff claimed against the defendants, inter alia, for a specified sum, being half of the profit made from the sale of the two cars and for a quantified sum, being the value of the three cars or alternatively, in respect of the three cars, for their possession.

(3) The first defendant denied that the second defendant was its director or agent and therefore had no authority to contract on its behalf. The defendants claimed that they had their own arrangement in that the first defendant would purchase used Mercedez Benz cars from the second defendant and for that purpose, the first defendant had given the second defendant a deposit of RM250,000 for the purchase of six to eight such cars. Further, they contended that the second defendant had sold six of the cars to the plaintiff and the five cars claimed by the plaintiff were in fact amongst the six cars sold to the plaintiff.

(4) The learned judge, based on his findings of fact and on credibility, believed the plaintiffs story and rejected the defendants' version.

[4] Before us, learned counsel for the first defendant submitted that until 2 December 1992, the plaintiff never met DWI, the managing director of the first defendant who was not known to him. There was no evidence before the court that the second defendant was a director of the first defendant. Only the second defendant claimed to be so. And further, the first defendant never made any representation that the second defendant was its agent and/or director. The representation made by the second defendant cannot bind the first defendant. The representation must be made by the first defendant. He cited the case of *Attorney-General for Ceylon v AD Silva* [1953] AC 461 at p 479 (PC) in support thereof. With regard to the agreement for the purchase of the car by Tengku Ahmad Faisal (at pp 609–611 Rekod Rayuan Jilid Dua), it was executed before the Plaintiff met DWI for the first time (25 September 1992). Although the second defendant signed the agreement on behalf of the first defendant as a director, the word 'DIRECTOR' and the NR1C number of the second defendant were written by PW4. The first defendant was not at all involved in the execution of the agreement and the agreement was not shown or made known to DWI though the deposit under the agreement, in the form of a cheque made to the first defendant, was collected by the second defendant and banked into the first defendant's account. Therefore, the second defendant had no actual or ostensible authority to bind the first defendant in respect of the oral agreement made between the plaintiff and the second defendant. As such, counsel insisted that the learned judge had misdirected himself in holding that the second defendant was an agent of the first defendant with authority to bind the first defendant. Further, he asserted that although the

learned judge did not reject the existence of a separate agreement between the first defendant and the second defendant to purchase used Mercedes Benz cars from the United Kingdom, the learned judge failed to take into account the relevant documents and evidence tendered by the first defendant to support its case that a deposit of RM250,000 was paid by the first defendant to the second defendant for that purpose (re at pp 601–602 Rekod Rayuan Jilid Dua). Having admitted in evidence, the learned judge erred in rejecting all the evidence relating to the payment of the said deposit of RM250,000 on the ground that it was not pleaded. Lastly, he submitted that the learned judge erred in having accepted the letter dated 2 December 1992 (at p 623 Rekod Rayuan Jilid Dua) from the DWI to the plaintiff, as evidence of confirmation by the first defendant that the plaintiff was the rightful owner of the five cars and that all proceeds of sale of the cars were to be paid to the plaintiff and the ownership of the cars unsold was to be handed over to the plaintiff. Counsel premised his argument on the basis that the letter at best might amount to ratification by the first defendant which was not pleaded by the plaintiff.

[5] On the issue of agency, the learned judge concluded that from the evidence he found as a fact that the second defendant was an agent of the first defendant with authority to bind the first defendant as shown by the fact that he could sign for and on behalf of the first defendant in respect of the agreement with the said Tengku Ahmad Faizal. He relied on the authority of *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233, where the court held that the appointment of an agent need not be in writing and that the existence of a relationship of principal and agent can be inferred from the circumstances of the case. He also referred to Treitel in the *Law of Contract* (1995 Ed) which listed the four conditions that ought to be satisfied before apparent or ostensible authority arises and concluded that the facts clearly showed all the conditions had been satisfied. In arriving at such conclusion, he also took into account of the fact that: (i) the second defendant had admitted to the plaintiff that he was a director of the first defendant; (ii) when the plaintiff first met DW1 concerning his claim to the cars DW1 did not dispute the representation that the second defendant was a director of the first defendant; (iii) DW1 signed the letter of confirmation as stated in para 4 above; and (iv) the plaintiff and PW2 believed that the second defendant was acting as the agent of the first defendant because they believed that as an individual the second defendant would not have been able to obtain more than one AP, as deposed without challenge.

[6] A scrutiny of the judgment will reveal that the learned judge came to his findings and conclusions on the issue of agency based on the totality of the evidence adduced, that is to say, the combined effect of the events that took place from the time when the oral agreement was concluded between the plaintiff and the second defendant in the middle of 1992 until 2 December 1992 when the letter of confirmation was issued by DW1 to the plaintiff. We are satisfied with the approach taken by the learned judge in considering the issue.

[7] The learned judge rejected all the evidence relating to the purported payment of RM250,000 deposit by the first defendant to the second defendant because it was not pleaded. Had that been the defendants' case, their solicitors would have been instructed to plead the material facts or to amend their pleadings at the trial for the purpose. However, the learned judge did not reject the existence of a separate agreement between the first defendant and the second defendant whereby the former, as an importer of cars from London, would buy the cars from the latter because obviously it was pleaded (see para 13(a) of the statement of defence and counterclaim of the first defendant at p 47 Rekod Rayuan Jilid Satu).

[8] We are of the view that the learned judge was right in law and in fact in making the selective approach. The payment of deposit is concerned with pleadings and because the material matter was not pleaded, trite law demands that it should be rejected. And whereas the existence of the separate agreement between the first d and the second defendant is related to admissibility; and if it is pleaded and admissible in evidence the court has to consider it which may not necessarily be favourable to the party adducing it. However, in this case the learned judge on the totality of the evidence and credibility, though did not reject it, had rendered it in obscurity when he used it as one of the reasons for rejecting DWl's claim that the letter of confirmation dated 2December 1992 was issued by him not voluntarily, by misrepresentation on the part of the plaintiff and under threat. On this point, the learned judge said:

> If the contents of these two documents are intended to speak for themselves and if they are true of their contents, then I see no reason why DW1 had signed CABD 74 nor allow himself to be subjected to threats by the Plaintiff.

[9] In respect of the letter of confirmation, the learned judge held that its contents must be deemed to be agreed and admitted because it was put into the CABD without any challenge and pursuant to his direction. He found that neither DW1 nor the defendants had satisfied him, upon the basis of s 103 of the Evidence Act 1950, that it ought to be rejected. Therefore, he considered it and used it as one of the basis for holding that the second defendant was an agent of the first defendant with authority to bind the first defendant.

[10] We agree with the stand taken by the learned judge in dealing with the evidence. As it was admitted in evidence including its contents he was entitled to consider it in the manner as he did. He did not consider it as ratification because ratification was not the issue before him but he considered the letter and its contents as one of the factors in his determination whether the second defendant was the agent of the first defendant with authority to bind the first defendant. Ratification was surmised by learned counsel only in his submission. With due respect, we do not agree with him.

[11] Therefore, for the aforesaid reasons, we decline to interfere with the conclusions of the learned judge based on the findings of fact and on credibility.

[12] Now, on the appeal by the second defendant learned counsel submitted that by virtue of the provisions of s 183 of the Contracts Act 1950, the second defendant being the agent of the first defendant, could not be personally

liable on contract entered into by him on behalf of the first defendant. He cited a host of authorities, including *Plantation Agencies Sdn Bhd v Haji Ariffin bin Haji Ismail* [1978] 1 MLJ 219 (FC) and *Medicon Plastic Industries Sdn Bhd v Syarikat Cosa Sdn Bhd* [1993] 2 MLJ 416 (SC) in support thereof.

[13] Section 183 reads:

> Agent cannot personally enforce, nor be bound by, contracts on behalf of principal.
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> In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal nor is he personally bound by them.
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> Such a contract shall be presumed to exist in the following cases:
>
> Presumption of contract to contrary.
>
> (a) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
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> (b) where the agent does not disclose the name of his principal; and
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> (c) where the principal, though disclosed, cannot be sued.

[14] We agree with learned counsel. The facts do not call for our consideration on the presumption of contract to the contrary.

D1's appeal dismissed and D2's appeal allowed.

Reported by Lim Lee Na